80-1706

Office-Supreme Court, U.S.
FILED
APR 13 1981
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In The

Supreme Court of the United States

October Term, 1980

Docket No. .....7.....

DOUGLAS LaCHANCE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit entered on February 12, 1981.

Questions Presented

1. Did the court below err in holding that the Taft-Hartley Act, 29 U.S.C. §186(b), is an absolute criminal prohibition against any union official acquiring an ownership interest in a business which does not, but theoretically could, employ union members?

2. Did the court below err in affirming convictions of tax evasion based on a factual theory of venue which was prejudicially at variance with the legally insufficient theory on which the case had been initiated, tried and submitted to the jury?

3. Did the court below err in upholding the cross-examination of the defendant as to the prior unrelated criminal convictions of his alleged associates?

4. Did the court below err in affirming convictions under the Taft-Hartley Act on a legally insufficient theory of venue?

5. Did the court below err in upholding a sentence which was based in part on Mr. LaChance's alleged post-trial refusal to cooperate with the Government in reliance on his constitutional privilege against self-incrimination?

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Opinion Below

The unpublished opinion and order of the United States Court of Appeals for the Second Circuit is printed in Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 12, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions

Amendment V

"No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; ***"

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ***"

Statutory Provisions

The following statutory provisions are involved herein: 29 U.S.C. §186, printed in Appendix B hereto; 26 U.S.C. §7201, printed in Appendix C hereto; and Rule 18, Federal Rules of Criminal Procedure, printed in Appendix D hereto.

Statement of the Case

Petitioner Douglas LaChance was charged on February 20, 1980, in an indictment filed in the United States District Court for the Southern District

of New York. The 136-count indictment charged Mr. LaChance, then president of the Newspapers and Mail Deliverers' Union ("NMDU"), with 64 counts of extortion of money, by means of fear of economic harm, from certain wholesale newspaper delivery companies ("the wholesalers") in violation of 18 U.S.C. §1951 (the Hobbs Act), 64 counts of receiving this money in violation of 29 U.S.C. §186(b)(The Taft-Hartley Act), four counts of receiving funds from Russ Trucking Company in violation of 29 U.S.C. §186(b), one count of conducting the affairs of the NMDU through a pattern of racketeering by means of the Taft-Hartley and Hobbs Act charges in violation of 18 U.S.C. §1962 (the R.I.C.O. statute), and three counts of

willfully failing to report these funds on his 1976, 1977 and 1978 federal income tax returns in violation of 26 U.S.C. §7201.

The trial of these charges commenced on May 1, 1980. The District Court entered a judgment of acquittal at the close of the Government's case on twelve counts. On May 15, 1980, the jury returned a verdict of guilty on all counts submitted to them and a special verdict of forfeiture of Mr. LaChance's union office pursuant to 18 U.S.C. §1963.

On June 26, 1980, the District Court sentenced Mr. LaChance to a total of twelve years and four months imprisonment and imposed fines totalling $100,000. The District Court ordered immediate

execution of the verdict of forfeiture, and stayed the fine and imprisonment pending appeal.

The evidence at trial involved allegations of payments to Mr. LaChance by wholesale newspaper dealers, each of which was the subject of parallel Hobbs Act and Taft-Hartley Act charges. The direct evidence on each of the wholesaler counts connecting the alleged demand or payment to Mr. LaChance consisted, at best, of no more than the virtually uncorroborated testimony of a single witness, generally a middleman employed by the wholesalers. Mr. LaChance took the stand and denied receiving or demanding any of the payments.

The Government also offered evidence, unrelated to the other charges, regarding payments by Russ Trucking, which were

the subject only of Taft-Hartley counts. Russ Trucking is a small, historically non-union trucking company that nightly delivers the El Diario newspaper from a Connecticut printing plant to Manhattan where NMDU employees of the El Diario distribute it.

The day-to-day management of Russ Trucking was done by an accountant, with aid and advice from Leon Braunstein, a consultant to several of the wholesalers, and th alleged principal middleman for the wholesaler payments. The Government introduced some evidence indicating that Mr. LaChance owned the company, and took this position in summation.

The accountant testified that he drew various checks to two alleged no-show employees and checks to cash at Mr. LaChance's direction, and gave these checks or cash generated from the checks

to Mr. LaChance at Mr. LaChance's home on Long Island. The proceeds of all of these checks were alleged in the tax evasion counts to be unreported income and in Counts 130 through 133 as having been received in violation of 29 U.S.C. §186 in that the NMDU "could and would" admit Russ Trucking employees to membership.*

The evidence relating only to the Russ Trucking counts (and to the tax evasion counts insofar as the Russ Trucking payments are included in those counts) included a tape recorded conversation admitted over strong defense objection, allegations of association with convicted criminals, involvement in corporate skimming, participation

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*There was no evidence that the NMDU ever tried to organize Russ Trucking or that any of the employees applied for or would be eligible for NMDU membership. There was no evidence that the NMDU represents or would represent the employees of any independent truckers.

in other crimes, use of no-show employees, falsification of books and records, concealment of ownership interests and other matters which the Government argued on summation showed Mr. LaChance's lack of credibility when he denied receiving the alleged payments which are the subjects of all of the other counts of the indictment. Accordingly, it is respectfully submitted that if this Court determines that the convictions on the Russ Trucking and tax evasion counts were improper, Mr. LaChance is entitled to a new trial on all remaining counts.

On February 12, 1981, the United States Court of Appeals for the Second Circuit reversed the convictions on three Taft-Hartley counts on the grounds that no basis for venue in the Southern District of New York was established. The Court of Appeals affirmed the convictions

on all other counts, and remanded the case for resentencing to reflect the reversal of the three counts. On March 4, 1981, the District Court resentenced Mr. LaChance to twelve years imprisonment and a fine totalling $98,500, and ordered him to surrender on March 30, 1981. Mr. LaChance surrendered as ordered and is currently serving his sentence at the United States correctional institution at Danbury, Connecticut.*

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*The United States District Court for the Southern District of New York exercised jurisdiction in this case pursuant to 18 U.S.C. §3231. The jurisdiction of the United States Court of Appeals for the Second Circuit was invoked pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, in holding that 29 U.S.C. §186 is an absolute prohibition against any union official acquiring an ownership interest in a business which does not, but theoretically could, employ union members, rendered a decision interpreting the Taft-Hartley Act in conflict with the statute's language, history and purpose.

The Court of Appeals' holding on the "Russ Trucking" counts that the Taft-Hartley Act, 29 U.S.C. §186(b), is an absolute prohibition against any union official acquiring an ownership interest in a business which does not, but theoretically could, employ union members raises an important question as to the limitations which Congress intended to and did impose upon the right to contract of every union official and employer in this nation. The Court of Appeals' holding totally ignores Congress'

express statement when amending and supplementing the Taft-Hartley Act in the Labor-Management Reporting and Disclosure Act of 1959 that a labor official's ownership interests in non-union employers which the union is not actively seeking to organize need not even be disclosed under 29 U.S.C. §432 "because they are not matters of public concern". Sen. Rep. No. 187, 89th Cong., 1st Sess. (1959), reprinted in 2 U.S. Code Cong. & Ad. News 2318, 2331 (1959). See also H. Rep. No. 741 (1959), reprinted in id., 2424 at 2433.

The facts in the present case demonstrate the harsh result of the Second Circuit's incorrect interpretation of section 186. Mr. LaChance was convicted on Counts 130-133 on the theory that sometime after he was elected president of the 4000-member NMDU, he became a

concealed owner of and then received funds from a historically non-union corporation, Russ Trucking Company, which had three to four employees, who because of the nature of Russ Trucking's business and its geographical location allegedly could have been represented by the NMDU. Neither the NMDU nor the Russ Trucking employees made any attempt to unionize the company. There was no allegation at trial that Russ Trucking was a sham, or that it was being used as a conduit for prohibited funds from some other employer. See United States v. Overton, 470 F.2d 761 (2d Cir. 1972), cert.denied, 411 U.S. 909 (1973). This alleged ownership interest is not required to be disclosed under 29 U.S.C. §432 since the NMDU was not actively seeking to unionize Russ Trucking. It is impossible that Congress intended for someone to become a convicted criminal and barred

from all union activities for over five years (29 U.S.C. §504) for an act which Congress did not believe presented a sufficiently serious conflict of interest to even require public disclosure.

In the only known reported analogous case where the Government previously contended that the receipts of a dividend by a bona fide shareholder-union official was a criminal violation of section 186, the District Court held that the section "was intended to reach only certain forms of bribery and extortion and was not designed to be a sweeping regulation or prohibition of all forms of conflict of interest." United States v. Lippi, 190 F. Supp. 604 (D.Del. 1961). As the legislative history indicates, Lippi is clearly incorrect; section 186 is not an absolute prohibition.

The purpose of Section 186 was to prevent bribing of labor representatives,

extortion of employers and abuse of welfare funds. Arroyo v. United States, 359 U.S. 419, 425-26 (1959). The statute was made as broad as possible to prevent abuse, United States v. Roth, 333 F.2d 450 (2nd Cir. 1964), cert.denied, 380 U.S. 942 (1966), by prohibiting the passing of "something of value", 29 U.S.C. §186(a), from employer to representative without the necessity of proof that bribery or extortion was intended. This does not, however, mean that every transfer of funds between employer and representative is prohibited. There could be no question, for example, that section 186 would prevent a employer from paying funds to a representative to satisfy a judgment the representative obtained against the employer for injury sustained due to the employer's negligence in a car accident. As Roth suggests, the "something of value" must be a thing

potentially capable of the abuses to be guarded against. 333 F.2d at 454.

Where as here, the transfers of funds arose out of right unrelated to the employer-representative relationship, nothing of value within the terms of the Act existed. Since a corporation owner is entitled to withdraw excess profits from the corporation, the funds that pass to him in this manner are his as a matter of right and are not "something of value" in the nature of a potential bribe or extortion payment.

Any doubt that Congress intended section 186 to cover the present case, characterized by the Court of Appeals as a "conflict of interest", [See Appendix at A8-A9, infra] is removed by Congress's express statements when amending the Taft-Hartly Act in 1959:

"Embezzlement, bribery, extortion and similar offenses are made Federal crimes by the committee bill. There are three reasons for relying upon the milder sanction of reporting and disclosure to eliminate improper conflicts of interest:

(1) The searchlight of publicity is a strong deterrent. This is a new and treacherous field for legislation. Apart from a few narrow statutes there are no general laws imposing criminal penalties upon those who enter into conflicts of interest in breach of fiduciary duties. Before adopting extreme measures it is wise to see whether milder sanctions are sufficient.

Sen. Rep. No. 187, supra in 2 U.S. Code Cong. & Ad. News 2332-33(1959) (emphasis added).

The decision of the Court of Appeals is thus at war the language, history and purpose of the Taft-Hartley Act, and should be reversed.

II.

The Court of Appeals, in conflict with appliable decisions of this Court and of other Court of Appeals, upheld venue on the tax evasion counts on a factual theory which was prejudicially at variance with the legally insufficient theory on which the case had been initiated, tried and submitted to the jury.

Since it was undisputed that Mr. LaChance's tax returns were not prepared, signed or filed in the Southern District of New York, the only allegation in the tax evasion counts of the indictment which could arguably serve as a basis for venue in the Southern District was that Mr. LaChance "received cash payments" in that district. Before and during trial, the Government's theory, adopted by the trial court, was that the mere "demanding, and receiving of large amounts of cash payments in the Southern District" which were later not reported

on the defendant's tax returns "established the jurisdictional nexus". The Court of Appeals, in direct contravention of this Court's holding in Dunn v. United States, 442 U.S. 100 (1979), affirmed Mr. LaChance's conviction on these counts on the basis of the Government's theory, argued for the first time on appeal, that "affirmative acts of evasion" had been committed in the Southern District of New York, in that Mr. LaChance took care to ensure that cash was used in making the payments and that Mr. LaChance kept no records.

Dunn v. United States, 442 U.S. 100, 106 (1979) held that when a criminal case is initiated, tried and submitted to the jury on one factual theory, it "offends the most basic notions of due process" to uphold the conviction on

another theory which was neither charged in the indictment nor submitted to the jury. Accord, Chiarella v. United States, 445 U.S. 222, 236-37 & n.21 (1980); Rewis v. United States, 401 U.S. 808, 814 (1971); United States v. Carman, 577 F.2d 556, 565 (9th Cir. 1978). If the factual theory relied upon at trial was insufficient as a matter of law, reversal of the conviction is required even if "the same result would likely obtain on retrial". Dunn v. United States, supra, 442 U.S. at 107.

Here, the theory of venue argued by the Government at trial, that venue is proper in a tax evasion prosecution in any district where the defendant merely received income in cash, is plainly incorrect. Retail businesses receive income in cash every day, but no violation of the tax laws is committed unless some

step is taken to conceal the income and a tax return is prepared which omits such income. Venue is proper only "when the defendant's actions [in the district] have progressed to the point where a court can confidently conclude that a crime has been committed." United States v. Chestnut, 533 F.2d 40, 47 (2d Cir. 1976), cert. denied, 429 U.S. 829 (1977). The mere receipt of income is not a violation of the tax laws. United States v. Granello, 365 F.2d 990, 994 (2d Cir. 1966), cert. denied, 386 U.S. 949 (1967).

Even if the theory accepted by the Court of Appeals, that venue is proper in any district where the defendant committed an affirmative act of evasion, were legally sufficient, Mr. LaChance was clearly prejudiced by the failure to present this issue to the jury. Spies

v. United States, 317 U.S. 492, 499 (1943) held that 26 U.S.C. §7201 requires a wilful and positive attempt to evade or defeat a federally imposed tax which must be proven by "conduct, the likely effect of which would be to mislead or to conceal" if a motive to evade taxes played any part in such conduct. The existence of a tax evasion motive is a jury question. Id. at 500. Here, the jury might well have found that other alleged violations of law were the sole motive for any concealment. See Ingram v. United States, 360 U.S. 672, 679 (1959). Likewise, a substantial question existed as to whether the alleged acts of concealment occurred in the Southern District of New York or indeed, if they

occurred at all.* Failure to place this issue before the grand jury thus requires reversal. United States v. Black Cloud, 590 F.2d 270 (8th Cir. 1979).**

*There was no evidence of any steps taken by LaChance to assure that the alleged payments were in cash. No support in the record for this allegation was cited by either the Government or the Court of Appeals. Further, since LaChance lived in the Eastern District of New York, any alleged failure to keep records arguably occurred there. Moreover, records concerning some of the alleged payments, allegedly created in the Southern District at LaChance's direction and with his assistance, were introduced in evidence at trial as Government exhibits.

**The jury was not instructed on venue as to tax evasion. The jury was instructed that the crime of tax evasion required an affirmative act of evasion; but the only affirmative act mentioned in this regard in the instructions was the filing of a false tax return. Acts of concealment were referred to in the instructions only as possible circumstantial evidence of wilfulness. The jury was not instructed, however, that such acts could be considered for venue purposes under any circumstances.

III.

The Court of Appeals rendered a decision upholding the cross-examination of Mr. LaChance as to prior convictions of his alleged associates, in conflict with applicable decisions of other Courts of Appeals.

Mr. LaChance, who did not put his character in issue, was cross-examined concerning his knowledge of the prior unrelated convictions of Matthew Troy, a personal friend and well-known local politician, for tax evasion and grand larceny, of a Charlie DeLutro, a/k/a Charlie West, who was briefly mentioned in a tape recording as someone with whom Mr. LaChance was going to meet on an issue unrelated to the case, for extortion, and of Peter DiPalermo, an acquaintance, for narcotics, counterfeiting and "numerous" instances of tax evasion. None of these men were co-defendants or alleged unindicted co-conspirators. Defense counsel's

objections were sustained only as to the Troy question.* The cross-examination concerning associates' convictions for serious offenses, including some of the precise offenses with which Mr. LaChance was charged, violated his substantial rights by putting before the jury insinuations that Mr. LaChance had a general criminal propensity because he associated with convicted felons. Any attempt at "guilt by association" is, of course, impermissible. United States v. DeDominicus, 332 F.2d 207 (2d Cir. 1964); United States v. Gosser, 339 F.2d 102, 112 (6th Cir.), cert. denied, 382 U.S. 819 (1964)(same).

*Despite the trial court's sustaining of the defendant's repeated objections, the prosecutor asked 21 separate questions regarding Mr. Troy.

The Court of Appeals, agreeing that these questions were "ill-advised in view of the risk of prejudice to the defendant" [A4 infra], , nevertheless upheld the trial court's refusal to grant a mistrial on the ground that these questions were permissible to rebut Mr. LaChance's general theory of defense which the Court of Appeals characterized as claims that Mr. LaChance always acted in the best interest of the union and avoided even the appearance of impropriety.

This holding violates the settled law that evidence of criminal acts of associates only is permissible, when character is not in issue, to prove an element of the Government's case or to contradict a specific factual state-

ment made by the defendant in his direct testimony. United States v. Labarbera, 581 F.2d 107, 109 (5th Cir. 1978); United States v. Vigo, 435 F.2d 1347, 1350 (5th Cir.), cert. denied, 403 U.S. 908 (1971); United States v. Crawford, 438 F.2d 441, 444-45 (8th Cir. 1971); United States v. Miesch, 370 F.2d 768, 773 (3rd Cir. 1966)(to rebut entrapment defense by showing predisposition).

Mr. LaChance's direct testimony concerning what the Second Circuit characterized as avoiding the appearance of impropriety in his associations was only that: (1) he denied ever meeting alone with one alleged middleman in contradiction to that person's testimony and (2) that he made it a practice never to meet alone with two of the seven employers involved in the case. He

freely admitted meeting alone with the principal alleged middleman. Likewise, Mr. LaChance's direct testimony concerning what the Second Circuit characterized as his "best interest of the union" defense [A4 infra], was only that (1) he never missed a union meeting (2) he was a trustee of the union pension and welfare fund and (3) that he twice rejected bribe offers by the principal alleged middleman. The questions concerning Mr. LaChance's alleged associates could not serve as contradictions of any of these statements.

The Court of Appeals' holding directly contradicts the holdings of the Fifth and Eighth Circuits. In United States v. Vigo, 435 F.2d 1347 (5th Cir.), cert. denied, 403 U.S. 908 (1971), defendant testified that she knew nothing about narcotics and knew no one who had

dealings in narcotics with co-defendant. Cross-examination establishing that her husband was convicted of a narcotics offense and was a friend of co-defendant (but not involved with narcotics dealings with co-defendant) was held reversable error since the highly prejudicial cross-examination did not relate to the "precise point" as to which defendant testified on direct. Id. at 351. In United States v. Ochoa, 609 F.2d 198, 204-206 (5th Cir. 1980), the court held that defendant, who had both offerred character evidence and denied complicity in drug transactions, had not opened the door to testimony as to her brother's convictions for importing drugs. In United States v. Crawford, 438 F.2d 441 (8th Cir. 1971), defendant testified that he never handled narcotics. Cross-examination as to his knowledge of

certain associates' drug addiction and drug convictions was "far broader" than the direct testimony and required reversal for unfairly connecting him "in the eyes of the jury with an entire group of undesirables", id. at 446, precisely what the prosecution did to Mr. LaChance. See also United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978)(reversal required for impermissible attempt to taint defendant's character through guilt by association with question as to son's arrest for similar but unrelated offense). If the cross-examination in Ochoa, Vigo and Crawford went impermissibly beyond fair rebuttal to the defendant's direct testimony, the same standard requires reversal in Mr. LaChance's case.

The Court of Appeals' conclusion that "the questions did not impermissibly contribute to the verdict" [A4 infra] is not supportable. The credibility of Mr.

LaChance was crucial to this case, "and any error which reflected upon or tended to impeach the credibility of the defendant may not be said to be insubstantial". United States v. Pennix, 313 F.2d 524, 531 (4th Cir. 1963).*

The Court of Appeals' found no prejudice because the jury already had evidence that two alleged conspirators in the instant charges had been convicted (by plea agreement) for their part in the alleged scheme. The difference in jury impact due to relevance and degree is clear. What Mr. LaChance complains of is evidence concerning unrelated prior convictions of persons he allegedly voluntarily chose as personal associates.

*On the basis of this cross-examination, counsel for the government argued in summation that there "is a convicted hoodlum that this man [Mr. LaChance] is associating with."

The Court of Appeals also found this cross-examination to be harmless since it "constituted a small fraction of the cross examination of the defendant" [A4 infra] and in light of the other evidence at trial. But clearly the Government did not consider its evidence so strong that it did not to have to resort to trying to show guilt by association.

> When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have.

United States v. Pennix, supra, quoting Salerno v. United States, 61 F.2d 419, 424 (8th Cir. 1932).

IV.

The Court of Appeals affirmed convictions on numerous counts on a legally insufficient theory of venue, in violation of Mr. LaChance's constitutional rights.

Mr. LaChance's constitutional right to be tried in the district where the offenses were allegedly committed was violated by numerous counts of the indictment involving alleged violations of the Taft-Hartley Act, 29 U.S.C. §186(b). U.S. Const., Amend. VI; Rule 18, F.R.Cr.P.; United States v. Johnson, 323 U.S. 273, 276 (1944).

In the district court and on appeal, Mr. LaChance challenged the sufficiency of the evidence of venue as to Counts 27, 38-41, 79-81, 107, 114-16, 122, 127-29, and 130-33. The Court of Appeals reversed the convictions on Counts 127-29, and affirmed the convictions on all other counts on the basis of reasoning which is unsupported by the record and

insufficient as a matter of law. For example, as to Count 107, alleging that Feldman, an employer, made a payment in 1979 to Mr. LaChance through Braunstein, an alleged middleman, the Court of Appeals held that "the jury could reasonably infer from th[e] evidence that the payment in question, though delivered in the Eastern District [of New York], originated from conduct occurring in the Southern District" [A8 infra]. The "conduct" which the Court of Appeals refers to is a reference in the record to a conversation between Braunstein and Feldman in 1959, twenty years before the payment in question and many years before Mr. LaChance ever became involved with the union. The reasoning of the Court of Appeals is similar as to all of the other challenged counts. [See A5-8, infra]. Surely,

this can be no basis for venue as to Mr. LaChance. If a principal may not be tried in the place where his accessory acted, United States v. Walden, 464 F.2d 1015, 1019-20 (4th Cir.), cert. denied, 409 U.S. 867 (1972), surely a principal may not be tried in a place where his accessory allegedly committed a similar crime twenty years earlier.

V.

The Court of Appeals erred in upholding a sentence which was enhanced in part on account of Mr. LaChance's reliance on his constitutional rights, in violation of an applicable decision of this Court.

The Government asked the District Court to enhance Mr. LaChance' sentence on account of his alleged refusal to cooperate with the Government after trial. Mr. LaChance objected to the District Court's consideration of this factor, since his refusal was based on

his assertion in good faith of his constitutional privilege against self incrimination and thus could not be the basis for drawing any adverse inference. See Roberts v. United States, 445 U.S. 552, 559-61 (1980). The District Court, in imposing a sentence exceeding twelve years imprisonment plus fines totalling $100,000, stated that certain factors urged by the Government were not being relied on, but did not exclude reliance on Mr. LaChance's alleged failure to cooperate. Since reliance on this factor would violate Mr. LaChance's constitutional rights and contravene a recent decision of this Court, the sentence should be vacated; at the very least, a remand to clarify the record is necessary.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of February one thousand nine hundred and eighty-one.

Present: HONORABLE J. EDWARD LUMBARD
HONORABLE JAMES L. OAKES,
HONORABLE JON O. NEWMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v-

DOUGLAS LaCHANCE,
Defendant-Appellant.

80-1629

O R D E R

Defendant-appellant Douglas LaChance, former President of the Newspaper and Mail Deliverers Union (NMDU), appeals from a judgment of the District Court for the Southern District New York (Milton Pollack, Judge) convicting him after a jury trial of 58 counts of extorting labor payments in violation of 18 U.S.C. §1951 (the Hobbs Act), 62 counts of receiving unlawful labor payments in violation of 29 U.S.C. §186 (the Taft-

Hartley Act) one count of conducting the affairs of NMDU through a pattern of racketeering in violation of 18 U.S.C. § 1962 (the RICO Act), and 3 counts of tax evasion in violation of 26 U.S.C. §7201. We affirm in part and reverse in part.

1. The motion to suppress the tape recording of the conversation between La Chance and DiPalermo was properly denied. The officers' transcript of the conversation and the affidavit submitted in support of the application for an amendment of the eavesdropping warrant disclosed probable cause to believe that the conversation concerned loansharking in violation of New York's usury laws. The claim that the supporting affidavit was rendered deliberately or recklessly false by inaccuracies in the accompanyingy transcript did not entitle the defendant to relief under Franks v. Delaware, 438 U.S. 154 (1978). A presumption of validity attached to supporting affidavits. Id. at 171. After listening to the recording, Judge Pollack found that the officers' transcript was reasonably accurate. Based on our own comparision of the tape and the transcript we cannot say that this finding was clearly erroneous. Accordingly, suppression on this ground was not required. See United States v. Barnes, 604 F.2d 121, 152 (2d cir. 1979), cert. denied, 100 S.Ct. 1833 (1980). The claim that the affidavit was false and misleading in its allegation of compliance with minimization standards is without merit. The materials submitted to the District Court reflected a reasonable effort to intercept only narcotics-related conversations involving one of the individuals named in the

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2. Admission of the tape recording was well within the scope of the District Court's discretion. A tape recording should be excluded for inaudibility only when the "unintelligible portions are so substantial as to render the recording as a whole untrustworthy." United States v. Bryant, 480 F.2d 785, 790 (2d Cir. 1973). Otherwise, the inaudibility of a part of a tape recording goes to weight, not admissibility. United States v. Provenzano, 615 F.2d 37, 40 n.4 (2d Cir.), cert. denied, 100 S.Ct. 2921 (1980). Judge Pollack was able to "hear reasonably clearly the matters set forth in the recording," and he concluded that it was "certainly sufficiently intelligible . . . that a jury listenting to [it] could reach a fair conclusion as to what the subject matter was." After listening to the tape, we agree. We note, moreover, that the jurors were given the Government - and defense-prepared transcirpts of the recording and were instructed to make their own findings of what the recording contained. Admission of the recording was

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4. The evidence of venue on the tax counts, viewed in a light most favorable to the Government, was sufficient to permit the jury to find that LaChance committed an affirmative act of tax evasion in the Southern District. The evidence showed that LaChance received cash payments in the Southern District that he failed to report on his federal tax return. Care was taken to ensure that the payments were in cash, and no records of the payments were kept by LaChance. See United States v. Spies, 317 U.S. 492, 499 (1943).

5. The evidence of venue on the Taft-Hartley counts was at least marginally sufficient as to all but the counts involving the Weinberg acquisition payments.

a. The evidence as to the Russ Trucking payments (counts 130-33) showed that the cash that was demanded and received by LaChance was obtained at his direction from a Manhattan bank. The jury could infer from this evidence that in each instance the violation of §186(b) began or continued in the Southern District within the meaning of 18 U.S.C. §3237.

b. The evidence as to the Weinberg layoff payment in October 1976 (count 127) showed that this was merely another "usual payment of $3,000 per man" that Weinberg previously had delivered to LaChance through Braunstein. See App. 1072, 1102-03, 1114-15, 1161. The evidence further showed that Braunstein conducted his affairs from his office in the Southern District. See App. 814-15, 921-22, 953.

We think the jury reasonably could infer from these circumstances that the payment in question was part of an unlawful course of conduct that began or continued in the Southern District.

c. The evidence as to the Weinberg acquisition payments of December 1977 (count 127), February 1978 (count 128), and July 1978 (count 129) was insufficient to permit a finding of venue in the Southern District. So far as we can tell, there was no evidence that payments of this nature had been made in the past to LaChance at the urging of Braunstein. It appears that the payments were first suggested to Weinberg by Alvino in Weinberg's office in the Eastern District, pursuant to conversations between Alvino and LaChance at an unspecified location, and delivered by Alvino to LaChance in the Eastern District, App. 1074-83, 1168. The convictions on these counts must be reversed.

d. The evidence as to the Gelfand labor-peace payments (counts 38-41) was marginally sufficient to permit a finding of venue in the Southern District. Gelfand testified that Braunstein was the intermediary between the wholesalers and NMDU, App. 1008; that he consulted Braunstein regarding his problems with NMDU, App. 1009, particularly during the wholesalers' meetings in the Southern District, App. 1008, 1009-10; and that Braunstein had told him that he would have to make payments to the Union, App. 1010-11. The evidence showed that Braunstein told other wholesalers that a "laundry list" of payments had to be made to the Union,

App. 301. Braunstein collected labor-peace payments from the other wholesalers. Finally, Gelfand testified that he made the payments in question to LaChance pursuant to Braunstein's suggestion. App. 1016. There was no direct evidence as to where this conversation occurred, but we think the jury reasonably could infer from the totality of the circumstances that Braunstein either made this particular suggestion in the Southern District or that Gelfand's practice of making labor peace-payments had its origins in conduct ocurring in that District. Accordingly, we conclude that although the payments in question were delivered in New Jersey, a sufficient basis was shown to infer that the payments were solicitated in the Southern District.

e. The evidence as to the Gelfand Christmans payments of 1976-78 (counts 78-91) and the Gelfand election payments of 1976-78 (counts 114-16) was essentially the same as the evidence concerning the labor-peace payments, and we conclude, by the same reasoning applicable to those payments, that the evidence was marginally sufficient to support a finding of venue in the Southern District on these counts as well. Braunstein collected Christmas and election payments every year from the other wholesalers who also relied on Braunstein to avoid and resolve problems with the leadership of NMDU. See App. 826-30. These payments appear to have been part of the "laundry list" of payments that Braunstein discussed with all the wholesalers, including Gelfand, at the meetings in the Southern District. See App. at 301, 1008-11. Thus even thought

the payments were delivered in New Jersey, we think the jury could reasonably conclude that the payments were part of an unlawful course of conduct that began or continued in the Southern District.

f. The evidence as to the Feldman election payment of May 1979 showed that when Feldman joined the suburban Wholesaler's Association, Braunstein informed him that he would have to make payments for "certain things." App. 633-34. Thereafter, Feldman delivered election payments to Braunstein either in the latter's office or in a Howard Johnson's in the Bronx. App. at 637-39. We think the jury could reasonably infer from this evidence that the payment in question, though delivered in the Eastern District, originated from conduct occurring in the Southern District.

g. The evidence as to the Feldman contract payment of May 1979 (count 122) showed that after Feldman was informed by Braunstein of the payoff scheme, he made payments to Braunstein in connection with the negotiation of every subsequent collective bargaining agreement. App. 633-34. Here again, we conclude that the payment in question, though delivered in the Eastern District, could be viewed by the jury as part of a course of conduct that began or continued in the Southern District.

5. The convictions on the Russ Trucking counts are supported by sufficient evidence, and the jury instructions as to these counts were proper. There was ample evidence that the Russ Trucking drivers would or could become members of NMDU but for LaChance's conflict of

interest. NMDU represents employees engaged in the handling and delivery of newspapers in a territory that included Connecticut, the location of Russ Trucking, and the Russ Trucking drivers do this very type of work. The 1974 agreement between NMDU and El Diario could not reasonably be interpreted to preclude unionization of Russ Trucking's employees. the fact that the charge conformed to the literal terms of the absolute statutory prohibition against payments by any employer to an officer of a union that would admit to membership the employer's employees is no cause for holding that the charge was erroneous. The meaning of the statute is clear. Moreover, the scope of the prohibition conveyed by the plain terms of the statute did not require a qualifying instruction that the statute would not apply to LaChance if he owned Russ Trucking. The literal terms of the statute make no exception for firms in which a union official may have an ownership interest, and Congress wanted the statute to have the broadest possible scope in order to protect employees. See United States v. Roth, 333 F.2d 450, 453 (2d Cir. 1964), cert.denied, 380 U.S. 942 (1965); United States v. Annunziato, 293 F.2d 373, 379 (2d Cir.), cert.denied, 368 U.S. 919 (1961). The jury could reasonably find that the Russ Trucking payments were detrimental to the interests of the firm's employees. Such abuse of union power, which the statute was intended to prevent, is not beyond the reach of the statute merely because the payee may have an ownership interest in the payor. See

United States v. Overton, 470 F.2d 761 (2d Cir. 1972), cert.denied, 411 U.S. 909 (1973).

6. The claim that the convictions on the Hobbs Act counts must be reversed for lack of evidence of reasonable rear is without merit. The jury was properly instructed that to prove a Hobbs Act violation the Government had to show that the wholesalers made the payments out of a reasonable fear of economic injury. See United States v. Daley, 564 F.2d 645, 650 (2d Cir. 1977), cert.denied, 435 U.S. 933 (1978). The issue of each wholesaler's state of mind was peculiarly within the province of the jury. See United States v. Sears, 544 F.2d 585 (2d Cir. 1976). Moreover, the evidence as to each of the disputed counts was clearly sufficient. Klinghoffer testified that Braunstein told him that he would have to make payments in connection with the contract with NMDU, App. 382, and Klinghoffer also testified from experience that union problems could be "very costly," App. 379. The claim that he made the payments just to be "friendly" does not accurately reflect his testimony. He stated that it was good business to be friendly with union officials, App. 426, in order to avoid "very costly" problems. The absence of testimony by Passaic executives did not preclude a jury finding that the Passaic payments were delivered to LaChance through Braunstein out of a reasonable fear of economic injury. Braunstein's testimony and that of the other wholesalers amply supported a finding that all the executives who made payments to LaChance through Braunstein did so to avoid retaliation.

Nicol's testimony showed that Metropolitan made the payments on Braunstein's "laundry list" to avoid "bad trouble." App. 301-04. The claim that the strike payments were not made out of a reasonable fear is frivolous. Braunstein believed that unless the payments were made, the wholesalers would not be "permitted" to handle the interim papers. App. 839. The testimony of the other wholesalers showed that they shared his belief that the payments were absolutely required. See App. 186-87, 639-40, 1085, 1027-08.

7. The claim that the sentence was improper under United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), cert.denied, 423 U.S. 897 (1975), is without merit in light of United States v. Grayson, 438 U.S. 41, 52 (1978), which permits a court to weight the defendant's perceived perjury as a facter in determining an appropriate sentence.

For the foregoing reasons, we reverse the convictions on counts 127, 128, and 129, affirm the judgment in all other respects, and remand for resentencing in light of the reversal of the convictions on counts 127, 128, and 129.[1] The mandate shall issue forthwith.

/s/
Hon. J. Edward Lumbard

/s/
Hon. James L. Oakes

/s/
Hon. Jon O. Newman

Circuit Judges.

1. The effective aggregate sentence on all counts was imprisonment of 12 years, four months, and a fine of $100,000. The sentence on each of counts 127, 128, and 129 was two months' imprisonment and fine of $500. Two-month sentences on all 62 of the Taft-Hartley counts, including these three counts, were to run consecutively to each other for a total, on those counts, of 10 years, four months. This total term is to run concurrently with the ten-year term imposed on the RICO count. Two-year sentences on the three tax counts were to run concurrently with each other but consecutively to the sentences on all other counts. All fines were cumulative. Therefore, reversal of the convictions on three of the Taft-Hartley counts will presumably result in a reduction of six months in the aggregate sentence on the Taft-Hartley counts to a total of nine years and ten months; however, this will presumably result in only a four-month reduction in the aggregate sentence on all counts, since the two years on the tax will still result in a total aggregate sentence of 12 years. Reversal of conviction on the three Taft-Hartley counts will presumably reduce the aggregate fines by $1,500 to a total of $98,500. In entering a revised judgment, the District Court may wish to consider revising Part C, covering the Taft-Hartley counts, to make clear that counts 64, 67, 75, 77, and 78 were dismissed; absence of that notation after the reference in the judgment to counts "62 through 81" appears to make the total of Taft-Hartley counts greater by five than the true number.

APPENDIX B

29 U.S.C. §186.
Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest or an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee group or committee directly or indirectly to influence any other employees in the exercise of the

right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as definded in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo or such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason, of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or comodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents

jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection

by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative

for the purpose of defraying the costs of legal services for employees, and their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officiers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more thant $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of Territories and possessions shall have jurisdiction, for cause shown, and

subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrian violations of this section, without regard to the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX C

26 U.S.C. §7201

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of

a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

APPENDIX D

Rule 18, Federal Rules of Criminal Procedure. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

No. 80-1706

JUN 1? 198

In The

Supreme Court of the United States

October Term, 1980

DOUGLAS LaCHANCE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United State Courthouse in the City of New York, on the 12th day of February one thousand nine hundred and eighty-one.

Present: HONORABLE J. EDWARD LUMBARD
HONORABLE JAMES L. OAKES,
HONORABLE JON O. NEWMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v-

DOUGLAS LaCHANCE,
Defendant-Appellant.

80-1629

O R D E R

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1. The motion to suppress the tape recording of the conversation between La Chance and DiPalermo was properly denied. The officers' transcript of the conversation and the affidavit submitted in support of the application for an amendment of the eavesdropping warrant disclosed probable cause to believe that the conversation

concerned loansharking in violation of New York's usury laws. The claim that the supporting affidavit was rendered deliberately or recklessly false by inaccuracies in the accompanyingy transcript did not entitle the defendant to relief under Franks v. Delaware, 438 U.S. 154 (1978). A presumption of validity attached to supporting affidavits. Id. at 171. After listening to the recording, Judge Pollack found that the officers' transcript was reasonably accurate. Based on our own comparision of the tape and the transcript we cannot say that this finding was clearly erroneous. Accordingly, suppression on this ground was not required. See United States v. Barnes, 604 F.2d 121, 152 (2d cir. 1979), cert. denied, 100 S.Ct. 1833 (1980). The claim that the affidavit was false and misleading in its allegation of compliance with minimization

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their own findings of what the recording contained. Admission of the recording was proper in every respect. See United States v. Carson, 464 F.2d 424, 436-37 (2d Cir.), cert. denied, 409 U.S. 949 (1972).

3. The cross-examination of LaChance concerning his knowledge of the criminal records of Troy, DiPalermo, and West was ill-advised in view of the risk of prejudice to the defendant, but the prosecutor's questions did not warrant a mistrial and are not cause for reversal. The questions objected to were at least arguably permissible to rebut LaChances' claims that he always had acted in the best interests of NMDU and had strived in his associations to avoid even the appearance of impropriety. Accordingly, there is no basis for reversal on the ground that the questions were "purely inflammatory" and were asked in bad faith. The claim that the jury could

have convicted solely because the questions may have disclosed a general criminal propensity is meritless. The questions concerned the defendant's knowledge of the criminal records of others, not his own criminal record. The jury already knew that LaChance associated with at least two persons (Braunstein and O'Hearn) who had been convicted of making unlawful labor payments. Seven other individuals testified that they also made unlawful payments to LaChance. Viewing the prosecutor's questions, which constituted a small fraction of the cross-examination of the defendant, in light of the entire record developed during the course of the two-week trial, we are convinced that the questions did not impermissibly contribute to the verdict.

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to the Government, was sufficient to permit the jury to find that LaChance committed an affirmative act of tax evasion in the Southern District. The evidence showed that LaChance received cash payments in the Southern District that he failed to report on his federal tax return. Care was taken to ensure that the payments were in cash, and no records of the payments were kept by LaChance. See United States v. Spies, 317 U.S. 492, 499 (1943).

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and July 1978 (count 129) was insufficient to permit a finding of venue in the Southern District. So far as we can tell, there was no evidence that payments of this nature had been made in the past to LaChance at the urging of Braunstein. It appears that the payments were first suggested to Weinberg by Alvino in Weinberg's office in the Eastern District, pursuant to conversations between Alvino and LaChance at an unspecified location, and delivered by Alvino to LaChance in the Eastern District, App. 1074-83, 1168. The convictions on these counts must be reversed.

d. The evidence as to the Gelfand labor-peace payments (counts 38-41) was marginally sufficient to permit a finding of venue in the Southern District. Gelfand testified that Braunstein was the intermediary between the wholesalers and

NMDU, App. 1008; that he consulted Braunstein regarding his problems with NMDU, App. 1009, particularly during the wholesalers' meetings in the Southern District, App. 1008, 1009-10; and that Braunstein had told him that he would have to make payments to the Union, App. 1010-11. The evidence showed that Braunstein told other wholesalers that a "laundry list" of payments had to be made to the Union, App. 301. Braunstein collected labor-peace payments from the other wholesalers. Finally, Gelfand testified that he made the payments in question to LaChance pursuant to Braunstein's suggestion. App. 1016. There was no direct evidence as to where this conversation occurred, but we think the jury reasonably could infer from the totality of the circumstances that Braunstein either made this particular suggestion in the Southern District or that Gelfand's practice of making labor

peace-payments had its origins in conduct ocurring in that District. Accordingly, we conclude that although the payments in question were delivered in New Jersey, a sufficient basis was shown to infer that the payments were solicitated in the Southern District.

e. The evidence as to the Gelfand Christmas payments of 1976-78 (counts 78-91) and the Gelfand election payments of 1976-78 (counts 114-16) was essentially the same as the evidence concerning the labor-peace payments, and we conclude, by the same reasoning applicable to those payments, that the evidence was marginally sufficient to support a finding of venue in the Southern District on these counts as well. Braunstein collected Christmas and election payments every year from the other wholesalers who also relied on Braunstein to avoid and resolve problems

with the leadership of NMDU. See App. 826-30. These payments appear to have been part of the "laundry list" of payments that Braunstein discussed with all the wholesalers, including Gelfand, at the meetings in the Southern District. See App. at 301, 1008-11. Thus even thought the payments were delivered in New Jersey, we think the jury could reasonably conclude that the payments were part of an unlawful course of conduct that began or continued in the Southern District.

f. The evidence as to the Feldman election payment of May 1979 showed that when Feldman joined the suburban Wholesaler's Association, Braunstein informed him that he would have to make payments for "certain things." App. 633-34. Thereafter, Feldman delivered election payments to Braunstein either in the latter's office or in a Howard Johnson's in the Bronx. App. at 637-39. We think the jury could

reasonably infer from this evidence that the payment in question, though delivered in the Eastern District, originated from conduct occurring in the Southern District.

g. The evidence as to the Feldman contract payment of May 1979 (count 122) showed that after Feldman was informed by Braunstein of the payoff scheme, he made payments to Braunstein in connection with the negotiation of every subsequent collective bargaining agreement. App. 633-34. Here again, we conclude that the payment in question, though delivered in the Eastern District, could be viewed by the jury as part of a course of conduct that began or continued in the Southern District.

5. The convictions on the Russ Trucking counts are supported by sufficient evidence, and the jury instructions as to these counts were proper. There was ample evidence that the Russ Trucking

drivers would or could become members of NMDU but for LaChance's conflict of interest. NMDU represents employees engaged in the handling and delivery of newspapers in a territory that included Connecticut, the location of Russ Trucking, and the Russ Trucking drivers do this very type of work. The 1974 agreement between NMDU and El Diario could not reasonably be interpreted to preclude unionization of Russ Trucking's employees. the fact that the charge conformed to the literal terms of the absolute statutory prohibition against payments by any employer to an officer of a union that would admit to membership the employer's employees is no cause for holding that the charge was erroneous. The meaning of the statute is clear. Moreover, the scope of the prohibition conveyed by the plain terms of the statute did not require a qualifying instruction that the statute

would not apply to LaChance if he owned Russ Trucking. The literal terms of the statute make no exception for firms in which a union official may have an ownership interest, and Congress wanted the statute to have the broadest possible scope in order to protect employees. See United States v. Roth, 333 F.2d 450, 453 (2d Cir. 1964), cert.denied, 380 U.S. 942 (1965); United States v. Annunziato, 293 F.2d 373, 379 (2d Cir.), cert.denied, 368 U.S. 919 (1961). The jury could reasonably find that the Russ Trucking payments were detrimental to the interests of the firm's employees. Such abuse of union power, which the statute was intended to prevent, is not beyond the reach of the statute merely because the payee may have an ownership interest in the payor. See United States v. Overton, 470 F.2d 761 (2d Cir. 1972), cert.denied, 411 U.S. 909 (1973).

6. The claim that the convictions on the Hobbs Act counts must be reversed for lack of evidence of reasonable fear is without merit. The jury was properly instructed that to prove a Hobbs Act violation the Government had to show that the wholesalers made the payments out of a reasonable fear of economic injury. See United States v. Daley, 564 F.2d 645, 650 (2d Cir. 1977), cert.denied, 435 U.S. 933 (1978). The issue of each wholesaler's state of mind was peculiarly within the province of the jury. See United States v. Sears, 544 F.2d 585 (2d Cir. 1976). Moreover, the evidence as to each of the disputed counts was clearly sufficient. Klinghoffer testified that Braunstein told him that he would have to make payments in connection with the contract with NMDU, App. 382, and Klinghoffer also testified from experience that union

problems could be "very costly," App. 379. The claim that he made the payments just to be "friendly" does not accurately reflect his testimony. He stated that it was good business to be friendly with union officials, App. 426, in order to avoid "very costly" problems. The absence of testimony by Passaic executives did not preclude a jury finding that the Passaic payments were delivered to LaChance through Braunstein out of a reasonable fear of economic injury. Braunstein's testimony and that of the other wholesalers amply supported a finding that all the executives who made payments to LaChance through Braunstein did so to avoid retaliation. Nicol's testimony showed that Metropolitan made the payments on Braunstein's "laundry list" to avoid "bad trouble." App. 301-04. The claim that the strike payments were not made out of a reasonable fear is

frivolous. Braunstein believed that unless the payments were made, the wholesalers would not be "permitted" to handle the interim papers. App. 839. The testimony of the other wholesalers showed that they shared his belief that the payments were absolutely required. See App. 186-87, 639-40, 1085, 1027-08.

7. The claim that the sentence was improper under United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), cert.denied, 423 U.S. 897 (1975), is without merit in light of United States v. Grayson, 438 U.S. 41, 52 (1978), which permits a court to weight the defendant's perceived perjury as a facter in determining an appropriate sentence.

For the foregoing reasons, we reverse the convictions on counts 127, 128, and 129, affirm the judgment in all

other respects, and remand for resentencing in light of the reversal of the convictions on counts 127, 128, and 129.[1] The mandate shall issue forthwith.

/s/
Hon. J. Edward Lumbard

/s/
Hon. James L. Oakes

/s/
Hon. Jon O. Newman

Circuit Judges.

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1. The effective aggregate sentence on all counts was imprisonment of 12 years, four months, and a fine of $100,000. The sentence on each of counts 127, 128, and 129 was two months' imprisonment and fine of $500. Two-month sentences on all 62 of the Taft-Hartley counts, including these three counts, were to run consecutively to each other for a total, on those counts,of 10 years, four months. This total term is to run concurrently with the ten-year term imposed on the RICO count. Two-year sentences on the three tax counts were to run concurrently with each other but consecutively to the sentences on all other counts. All fines were cumulative. Therefore, reversal of the convictions on three of the Taft-Hartley counts will presumably result in a reduction of six months in the aggregate sentence on the Taft-Hartley counts to a

total of nine years and ten months; however, this will presumably result in only a four-month reduction in the aggregate sentence on all counts, since the two years on the tax will still result in a total aggregate sentence of 12 years. Reversal of conviction on the three Taft-Hartley counts will presumably reduce the aggregate fines by $1,500 to a total of $98,500. In entering a revised judgment, the District Court may wish to consider revising Part C, covering the Taft-Hartley counts, to make clear that counts 64, 67, 75, 77, and 78 were dismissed; absence of that notation after the reference in the judgment to counts "62 through 81" appears to make the total of Taft-Hartley counts greater by five than the true number.

APPENDIX B

29 U.S.C. §186.
Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest or an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any

of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or

employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as definded in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or

in connection with the unloading, of the cargo or such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason, of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court

or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or comodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative,

for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written

agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection

by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value

paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, and their families, and dependents for counsel or

plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officiers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more thant $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrian violations of this section, without regard to the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947,

until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX C

26 U.S.C. §7201

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

APPENDIX D

Rule 18, Federal Rules of Criminal Procedure.
Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

No. 80-1706

ALEXANDER L. S
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOUGLAS LACHANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government improperly cross-examined petitioner about the criminal records of three of his associates.

2. Whether petitioner's receipt of money from Russ Trucking Corporation was unlawful under 29 U.S.C. 186(b)(1).

3. Whether the evidence was sufficient to establish venue in the Southern District of New York with respect to certain counts on which petitioner was convicted.

4. Whether the district court, in imposing sentence, impermissibly considered petitioner's refusal to cooperate with the government in a criminal investigation.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1981. The petition for a writ of certiorari was filed on April 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 58 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and 18 U.S.C. 2; 62 counts of receiving unlawful labor payments, in violation of the Taft-Hartley Act, 29 U.S.C. 186(b), and 18 U.S.C. 2; one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); and three counts of tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to a total of 12 years' and four months' imprisonment, broken down as follows: concurrent terms of 10 years' imprisonment on the RICO count, nine years' and eight months' imprisonment on the Hobbs Act counts (two months per count), and 10 years' and four months' imprisonment on the Taft-Hartley counts (two months per count); concurrent two-year terms of imprisonment on the three tax evasion counts, to be served consecutively to the sentences imposed on the other counts. In addition, he was fined a total of $100,000. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A12).[1]

The trial evidence showed that petitioner was a business agent of the Newspaper and Mail Deliverers Union ("NMDU") from May 5, 1969, to May 3, 1976; he then served as president of NMDU for four years. During the 11 years that petitioner was an official of NMDU, he coerced executives of delivery

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[1] The court reversed three of the Taft-Hartley counts (Counts 127-129) because the evidence was insufficient to support venue in the Southern District of New York. On remand, the district court resentenced petitioner to a total of 12 years' imprisonment and fines of $98,500.

companies employing NMDU members to make a variety of illegal cash payments that exceeded $250,000. During the 1978 New York City newspaper strike, for example, petitioner enriched himself in the amount of $90,000 by demanding from wholesale deliverers ½¢ on each "interim newspaper" they delivered (Tr. 707-711, 508-509, 708-709, 955-962, 1076-1079; Gov. Exh. 6A, 6B, 6C, 6E).[2] On other occasions, he obtained illegal payoffs for various purposes in exchange for agreeing to layoffs of NMDU members (Tr. 84, 86-90, 92-94, 168-169; 560-564, 575, 686-690, 693-694, 941-943); in connection with the negotiation and signing of a collective bargaining agreement (Tr. 734, 1072-1073); to ensure the uneventful expansion of business by certain wholesalers (Tr. 946-953, 1034, 1036, 1061-1063); and to ensure labor peace (*e.g.*, Tr. 166-167, 180-182, 246, 519).

In addition, petitioner was an undisclosed principal in Russ Trucking Corporation, a non-union trucking company that profited from paying its drivers wages that were lower than those that it would have had to pay if the drivers had been NMDU members. By installing his personal accountant as Russ's treasurer, petitioner was able to obtain more than $89,000 in illegal cash payments from the company (Tr. 305-306, 314, 319, 322-323, 357-358, 361, 387-389, 704). Petitioner failed to report any of these illegal cash payments on his personal income tax returns.

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[2] "Tr." refers to the trial transcript; "App." refers to the appendix in the court of appeals; and "S.Tr." refers to the transcript of sentencing.

ARGUMENT

1. Petitioner contends (Pet. 29-37) that the government improperly cross-examined him concerning his knowledge of the criminal records of three of his associates, Peter DiPalermo (App. 1521-1522), Charlie West (App. 1523), and Matthew Troy (App. 1625-1626).[3] That contention lacks merit.

When petitioner testified at trial, he portrayed himself as a dedicated and incorruptible union official. He asserted that he had never missed a union meeting (App. 1446-1469), and he emphasized his service as a trustee and chairman of the union's $14 million pension and welfare fund (App. 1564-1566). He described in detail how he had continuously and firmly rejected every attempt by unscrupulous executives of wholesale companies to buy his influence (*e.g.*, App. 1470-1472, 1588, 1632-1633). He also asserted that he had even avoided any private meetings with such wholesalers "to make sure there was no hint of impropriety * * *" (App. 1577). In the face of this testimony, the government was certainly entitled to show that petitioner had not always acted in the best interests of NMDU or avoided the appearance of impropriety in his associations. Thus, it was proper for the government to ask petitioner whether he knew of DiPalermo's and West's criminal records, in connection with other evidence that he and DiPalermo had discussed union matters, including the doing of favors for West and for DiPalermo's relatives. Likewise, there was no impropriety in the government's inquiry concerning petitioner's knowl-

[3] DiPalermo had been convicted of counterfeiting, tax evasion, and a narcotics violation; West had been convicted of extortion; and Troy had been convicted of tax evasion and grand larceny.

edge of Troy's convictions, when the evidence showed that petitioner had enlisted Troy's assistance in removing NMDU's pension and welfare funds from one institution to another.

Nor was petitioner prejudiced by the government's questioning.[4] The jury already knew that petitioner was associated with wholesale delivery company representatives Leon Braunstein and Walter O'Hearn, both of whom had been convicted of making illegal labor payments. In addition, seven other representatives of wholesale delivery companies testified that they had made illegal payments to petitioner. Viewing the disputed questions (which constituted only a small part of petitioner's cross-examination) in light of the entire record developed during the course of petitioner's two-week trial, the court of appeals correctly concluded (Pet. App. A4) that these questions "did not impermissibly contribute to the verdict."

2. Petitioner also contends (Pet. 16-22) that his receipt of payments from Russ Trucking was not unlawful under 29 U.S.C. 186(b)(1), both because

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[4] We note that the question concerning Troy went unanswered because petitioner's objection to it was sustained, and that the court instructed the jury in its general charge that only the answers of witnesses are evidence (Tr. 1766). Petitioner admitted knowledge only of DiPalermo's conviction for counterfeiting. Significantly, petitioner did not find it necessary to request a jury instruction cautioning that his association with convicted felons should not be held against him. Finally, petitioner's reliance on *United States* v. *Ochoa*, 609 F.2d 198 (5th Cir. 1980), *United States* v. *Crawford*, 438 F.2d 441 (8th Cir. 1971), and *United States* v. *Vigo*, 435 F.2d 1347 (5th Cir. 1970), cert. denied, 403 U.S. 908 (1971), is misplaced. In each of these cases, unlike here, there was no legitimate purpose to be served by cross-examining the defendant with respect to the criminal records of relatives and acquaintances.

he had an ownership interest in the company and because Russ did not employ NMDU members. The court of appeals properly rejected that contention.

The plain language of Section 186(b)(1) makes unlawful the receipt by a union representative of "*any* payment * * * of *any* money" (emphasis added) that would violate Section 186(a). Likewise, Section 186(a)(2) prohibits the payment by an employer of "*any* money * * * to any labor organization, or any officer or employee thereof, which represents, seeks to represent, *or would admit to membership* any of the employees of such employer * * *" (emphasis added). Nothing in the statute requires that employees be present members of the union, nor does the statute contain any exception for payments to union officials who possess an ownership interest in the employer. See *United States* v. *Ryan*, 350 U.S. 299, 305 (1956) (Section 186 "outlaws all payments, with stated exceptions [not here relevant], between employer and representative"); *United States* v. *Overton*, 470 F.2d 761, 766 (2d Cir. 1972), cert. denied, 411 U.S. 900 (1973). The language of the statute is consistent with the broad congressional objective of " 'prevent[ing] employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers.' " *United States* v. *Roth*, 333 F.2d 450, 453 (2d Cir. 1964), quoting *United States* v. *Ryan*, 225 F.2d 417, 426 (2d Cir. 1955) (L. Hand, J., dissenting), rev'd, 350 U.S. 299, 300 (1956).

The trial evidence showed that NMDU represents employees engaged in the handling and delivery of newspapers in a territory that includes Connecticut, where Russ was located, and that Russ drivers do this very type of work. Because Russ drivers would therefore be eligible for membership in NMDU, the

court of appeals correctly held that petitioner's acceptance of payments from the company constituted a conflict of interest in express violation of Section 186(b)(1). That holding does not conflict with any decision of this Court or of any other court of appeals and therefore warrants no further review.[5]

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[5] Petitioner attempts (Pet. 17-18) to draw some support from the fact that 29 U.S.C. 432 requires that a union representative report any interest that he holds in an employer whose employees his union presently represents or is "actively seeking to represent," together with the fact that NMDU was not actively seeking to represent Russ employees. The reporting requirements of Section 432 are simply irrelevant here, however, because Section 186(b)(1), under which petitioner was prosecuted, prohibits the receipt of payments by union officials, not only from employers whose employees the union presently represents or is "actively seeking to represent," but also from employers whose employees the union "would admit to membership * * *." Indeed, this difference in language underscores the very different purposes of the two sections. The purpose of Section 432 is to give notice to employees of certain facts that may give rise to a conflict of interest on the part of an official of a union that presently represents them or is "actively seeking to represent" them. The purpose of Section 186(b)(1), on the other hand, is not to give notice of possible conflicts, but to prohibit certain dealings between representatives of management and labor. Thus, although there may be no immediate need to give the notice required by Section 432 (because the employees may have no practical need for such information until such time as the union is "actively seeking to represent" them) with respect to every union that "would admit [the employees] to membership" (29 U.S.C. 186(b)(1)), it is clear that a union official who receives payments from a company whose employees the union "would admit to membership" has violated Section 186(b)(1). In these circumstances, the fact that a union official may have no reporting duty does not, because of the divergent aims of the two sec-

3. Petitioner contends (Pet. 38-40, 23-27) that the evidence was insufficient to establish venue in the Southern District of New York with respect to 20 of the Taft-Hartley counts[6] and the three tax evasion counts.

Under 18 U.S.C. 3237, a criminal offense may be prosecuted in any district "in which such offense was begun, continued, or completed." With respect to the Taft-Hartley counts involving Russ (Counts 130-133), the evidence showed that the illegal cash payments received by petitioner were obtained at his direction from a bank within the Southern District of New York. Although the illegal payments underlying the remaining Taft-Hartley counts challenged by petitioner were all made outside the Southern District, the evidence established that the payments were solicited within the Southern District by Leon Braunstein, petitioner's middleman. Accordingly, the government proved by a preponderance of the evidence (see *United States* v. *Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977)) that all of the Taft-Hartley offenses were begun or continued within the Southern District.

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tions, support the conclusion that the official has not violated Section 186(b)(1).

Petitioner also relies (Pet. 19) on dictum in *United States* v. *Lippi*, 190 F. Supp. 604 (D. Del. 1961), to the effect that the receipt of a dividend by a union official, who is also a *bona fide* shareholder, does not violate Section 186(b)(1). As the Second Circuit stated in *United States* v. *Overton*, *supra*, 470 F.2d at 766, however, the reasoning in *Lippi* "ignore[s] the literal language of the statute * * *." At all events, the receipt of a dividend by a *bona fide* stockholder of a company is quite dissimilar from petitioner's receipt of secret cash payments here.

[6] Counts 27, 38-41, 79-81, 107, 114-116, 122, 127-129, 130-133.

Likewise, the evidence was not insufficient to establish venue in the Southern District of New York with respect to the tax evasion counts. While it is true that petitioner's tax returns were not prepared, signed, or filed within the Southern District, the evidence showed that the unreported income consisted of undocumented secret cash payoffs received within the Southern District. As the court of appeals held (Pet. App. A5), receipt of secret cash payoffs constitutes an affirmative act of evasion sufficient to establish venue in a tax evasion case. See *Spies* v. *United States*, 317 U.S. 492, 499 (1943); *Beaty* v. *United States*, 213 F.2d 712, 715 (4th Cir. 1954); *United States* v. *Stofsky*, 409 F. Supp. 609, 619 (S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).[7]

4. After trial, petitioner refused to cooperate in a criminal investigation on the ground that he would incriminate himself by doing so. He contends (Pet. 40-41) that the district court, in imposing sentence, impermissibly considered this refusal to cooperate.

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[7] Citing *Dunn* v. *United States*, 442 U.S. 100, 106 (1979), petitioner contends (Pet. 24-25) that the government impermissibly changed its theory of venue in the court of appeals. Petitioner argues that the government alleged in the district court that his mere demanding and receiving of large cash payments in the Southern District established the jurisdictional nexus, while it relied on "affirmative acts of evasion" in the court of appeals. But the demanding and receiving of secret payoffs in cash were precisely the "affirmative acts of evasion" upon which the court of appeals relied in upholding venue here (Pet. App. A5). Petitioner also objects to the district court's failure to charge the jury on the issue of venue on the tax evasion counts (Pet. 28 n.**), but he neither requested such an instruction nor objected to the court's failure to give such an instruction (see Tr. 1817-1823). See Fed R. Crim. P. 30.

Petitioner did not raise this issue in the court of appeals, however, and it is therefore not properly raised here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). At all events, petitioner's contention is insubstantial. Even assuming that a defendant's refusal to cooperate may not be held against him if it is based on a valid and timely assertion of his Fifth Amendment rights (a question this Court did not need to reach in *Roberts* v. *United States*, 445 U.S. 552 (1980)), the sentencing record here contains no suggestion that the district court in fact considered petitioner's refusal to cooperate when imposing sentence. Indeed, the sentence was expressly based on the "serious nature" of the offenses (S. Tr. 18), the court's belief that petitioner had perjured himself on the witness stand (*ibid.*), the absence of "extenuating circumstances" (*id.* at 19), and the "overwhelming proof of [petitioner's] culpability" (*ibid.*). All of these factors could properly be taken into consideration in selecting an appropriate sentence. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 347768 343

No. 80-1706

JUN 1981

In The

Supreme Court of the United States

October Term, 1980

DOUGLAS LaCHANCE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This Reply Brief is respectfully submitted in further support of Douglas LaChance's Petition for a Writ of

Certiorari. While petitioner's legal arguments are fully set forth in his original Petition, a short reply is necessary in order to correct the inadvertent factual inaccuracies which appeared in the Brief for the United States in Opposition [hereinafter cited as "U.S. Br."].

The Government claims that Mr. LaChance's contention, that the trial court violated his constitutional rights by considering in imposing sentence his refusal to cooperate in a criminal investigation on grounds of self-incrimination, may not be raised here because it was not raised in the Court of Appeals. (U.S. Br. at 10). Unfortunately for the Government, however, this issue <u>was</u> specifically raised in Mr. LaChance's reply brief in the Court of Appeals at 23-24, as

well as in the trial court. (Mr. LaChance's Response to the Government's Sentencing Memorandum at 6-7).

The Government states that Russ Trucking Corporation, of which petitioner was, according to the Government's evidence, an undisclosed principal, "profited from paying its drivers wages that were lower than those it would have had to pay if the drivers had been NMDU members." U.S. Br. at 3. The quoted statement has absolutely no support in the record whatsoever. This is the position petitioner maintained in the Court of Appeals.

In response to petitioner's argument that the Court of Appeals improperly unheld the cross-examination of Mr. LaChance as to prior, unrelated criminal convictions of his alleged associates (Petition for a Writ of

Certiorari at 29-37), the Government argues that, in response to petitioner's trial testimony that he rejected attempts by employers to buy his influence, "it was proper for the government to ask petitioner whether he knew of DiPalermo's and West's criminal records, in connection with other evidence that he and DiPalermo had discussed union matters, including the doing of favors for West and for DiPalermo's relatives." U.S. Br. at 4. However, the questions regarding DiPalermo (App. 1648-49)* and West (App. 1649-50) were limited to establishing whether LaChance knew these individuals and whether they had been convicted of precisely the same charges as LaChance was facing (extortion and

*"App." refers to the Appendix in the Court of Appeals.

tax evasion), and other serious offenses such as narcotic violations. The cross-examination, despite the Government's claims in the Court of Appeals and in this Court, was not designed to rebut any of Mr. LaChance's specific testimony; its effect was purely inflammatory. Moreover, the single fleeting reference on a tape recording admitted in evidence to Charlie West (App. 35) does not support the Government's claim that Mr. LaChance was "doing ... favors for West." (U.S. Br. at 4).

Similarly, the Government claims that "there was no impropriety in the government's inquiry concerning petitioner's knowledge of [Matthew] Troy's convictions, when the evidence showed that petitioner had enlisted Troy's assistance in removing NMDU's pension and welfare funds from one institution

to another." (U.S. Br. at 4-5). The simple answer to this assertion is that no such evidence appears anywhere in the record.*

While the Government suggests that Mr. LaChance has not properly preserved this issue for review by failing to seek a curative instruction (U.S. Br. at 5 n. 4), this argument is without merit in the light of Mr. LaChance's motion for a mistrial based on this cross-examination. (App. 1650-51).

As to petitioner's contention that venue was not proven on the Taft-Hartley counts (Petition for a Writ of Certiorari at 38-40), the Government

*The Government asked Mr. LaChance on cross-examination if any such plan to transfer the pension funds had ever existed, and Mr. LaChance replied that it had not. (App. 1626-27). No other evidence on this point was ever introduced.

claims, without citation to the record, that "the evidence established that the payments were solicited within the Southern District by Leon Braunstein, petitioner's middleman." (U.S. Br. at 8). In fact, as to the challenged counts, there was no such evidence. Indeed, the Court of Appeals did not rely on such claimed solicitations in upholding venue on these counts (Supp. App. at A8-A14),* but rather relied on other evidence, whose legal sufficiency to establish venue has been challenged by petitioner. (Petition for a Writ of Certiorari at 38-40).

Finally, the Government seeks to uphold venue on the tax evasion counts by claiming that "[w]hile it is true

*"Supp. App." refers to petitioner's Supplemental Appendix in this Court.

that petitioner's tax returns were not prepared, signed or filed within the Southern District, the evidence showed that the unreported income consisted of undocumented secret cash payoffs received within the Southern District" (U.S. Br. at 9) and hence "constitutes an affirmative act of evasion." (Id.) Here again, the Government misstates the record. There was no evidence of any steps taken by LaChance to assure that the alleged payments were in cash. Further, since LaChance lived in the Eastern District of New York, any alleged failure to keep records presumably occurred there. Moreover, records concerning some of the allegedly payments, allegedly created in the Southern District at LaChance's direction and with his assistance, were

introduced in evidence at trial as Government exhibits.

Accordingly, it is respectfully submitted that Mr. LaChance's petition for a writ of certiorari should be granted.

Respectfully submitted,

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